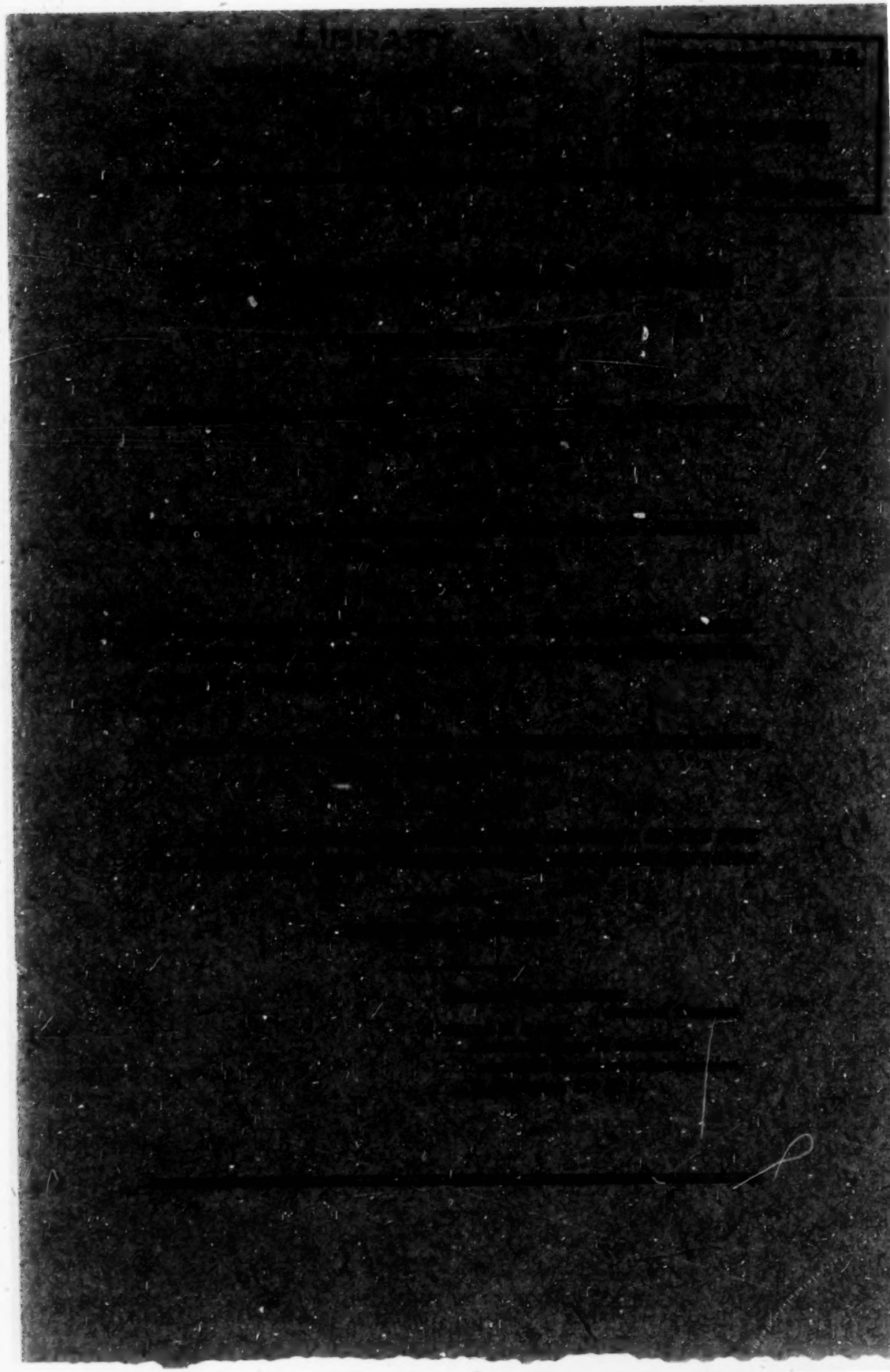

INDEX

	Page
Statement	1
Argument	7
Conclusion	22

CITATIONS

Cases:

Alleghany Corp. v. *Breswick & Co.*, 352 U.S. 151	8
Alton R. Co. v. *United States*, 315 U.S. 15	11
Baltimore Transfer Co. v. *Interstate Commerce Commission*, 114 F. Supp. 558, aff'd mem., 346 U.S. 890	8
Canadian Pacific Railway Company v. *United States*, 158 F. Supp. 248	12, 17, 22
Chicago, St. P., M. & O. R. Co. v. *United States*, 322 U.S. 1	11
Communications Comm'n v. *WJR*, 337 U.S. 265	18
Detroit, T. & I. R. Co. Control, 275 I.C.C. 455	17
Erie R. Co. Merger, 312 I.C.C. 185	13
Federal Comm'n v. *Pottsville Broadcasting Co.*, 309 U.S. 134	18
Herrin Transp. Co. v. *United States*, 108 F. Supp. 89, aff'd mem., 344 U.S. 925	8
Maintenance of Way Employes v. *United States*, 366 U.S. 169	8, 13, 21
Marin, County of v. *United States*, 356 U.S. 412	8, 16
McLean Trucking Co. v. *United States*, 321 U.S. 67	8
Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173	8, 21
Missouri Pac. R. Co. v. *United States*, 4 F. Supp. 449, aff'd mem., 293 U.S. 524	8, 10
M. & M. Transportation Company v. *United States*, 128 F. Supp. 296, aff'd mem., 350 U.S. 857	8
Nashville, City of, Tennessee v. *United States*, 155 F. Supp. 98, aff'd mem., 355 U.S. 63	7-8
New York, C. & St. L. R. Co. v. *United States*, 95 F. Supp. 811	12, 17
N. Y. Central Securities Co. v. *United States*, 287 U.S. 12	21, 22

Cases—Continued

	Page
Power Reactor Co. v. *Electricians*, 367 U.S. 396	21
Railway Labor Association v. *United States*, 399 U.S. 142	8
St. Joe Paper Co. v. *Atl. Coast Line R. Co.*, 347 U.S. 298	17
Schwabacher v. *United States*, 334 U.S. 182	17
Spokane International R. Co. Control, 295 I.C.C. 425	17
United States v. *Capital Transit Co.*, 338 U.S. 286	9
United States v. *Carolina Freight Carriers*, 315 U.S. 475	11
United States v. *Lowden*, 308 U.S. 225	21, 22
United States v. *Tucker Truck Lines*, 344 U.S. 33	9

Miscellaneous:

Hearings on S. 3097 Before a Subcommittee of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (1962)	20
Report of the Senate Subcommittee on Antitrust and Monopoly on The Railroad Merger Problem, 88th Cong., 1st Sess. (1963)	20

In the Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 510 & 511

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the Interestate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals, by organizations representing railroad employees, from the final judgment of the three-judge district court dismissing their complaints

seeking to set aside the order of the Commission approving, subject to specified conditions, the application of The Chesapeake and Ohio Railway Company to acquire control through stock ownership of the Baltimore and Ohio Railroad Company.

The application, filed with the Commission on June 14, 1960, was opposed by, among others, The New York Central Railroad Company, which filed rival applications to acquire control of B & O or, in the alternative, to participate with C & O in the joint control of B & O. The several applications were consolidated for hearing, the hearings lasting 37 days and consuming 5,686 pages of transcripts, and throughout the hearings Central remained an active opponent of C & O control of B & O.[1]

Additionally, the United States Department of Justice, the States of Massachusetts, Michigan, New York and Ohio, the Maryland Port Authority, cities such as Battle Creek, Mich., Cleveland, Ohio, Erie, Pa., Evansville, Ind., and New York, N. Y., dozens of shippers, and the Chicago and Eastern Illinois Railroad Company, Boston and Maine Railroad Company, New York, New Haven and Hartford Railroad Company and The Pittsburgh and Lake Erie Railroad Company, as well as the B & O and Central, intervened and participated in the proceedings, as did the Railway Labor Executives' Association, one of the appellants herein.

Following the submission of briefs, the examiner's report and recommended order conditionally approving

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[1] Central withdrew from the proceeding *after* the hearings were completed. The statement by the appellants in J.S. No. 511, p. 14, that as a result "the hearing, and in effect the record, collapsed," is erroneous.

the applications, exceptions and replies, and while the matter was pending for decision before the Commission, The Delaware and Hudson Company and The Delaware and Hudson Railroad Corporation, neither of which had been a party to the proceedings, on August 31, 1962, petitioned the Commission to consolidate the C & O application proceedings for decision with two merger proceedings instituted in the interim, Finance Docket No. 21510, et al., *Norfolk & Western Ry. Co. and New York, C. & St. L. R. Co.-Merger,* and related cases (the N & W-Nickel Plate merger case), and Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co.—Merger—New York Central R. Co.* (the PRR-Central merger case). In the former proceedings, the hearings had been completed and an examiner's report and recommended order awaited, which report and recommended order subsequently were served April 17, 1963, and in the latter proceedings, the hearings were in progress, as they continued to be, with intervening recesses, until October 2, 1963. The consolidation was urged so that "the most soundly conceived alignment of all the various railroads in the East will be accomplished" and was supported in principle by the Department of Justice, the Railway Labor Executives' Association and others. On October 24, 1962, the day following oral argument on the merits of the C & O's application, the entire Commission heard oral argument on the proposal for the consolidation of the cases.

The Commission entered its report and order on December 17, 1962. It said that it did not appear that the C & O's acquisition of control of the B & O would

result in any undue diversion of traffic or otherwise injure any railroad and that any benefits which might be expected from the joint consideration of the three cases would be more than offset by the harm to the B & O, and ultimately the public, that the attendant delay in passing upon the C & O's application would occasion. 317 I.C.C. 265. Accordingly, the Commission denied the petition for consolidation, but without prejudice as to whether the N & W-Nickel Plate and PRR-Central merger cases should be consolidated or jointly considered at some later date. 317 I.C.C. 266.

Turning to the merits of the C & O's application, the Commission found that the physical plant and rolling stock of the B & O had greatly deteriorated, and that the requisite replacements and improvements were beyond the means of the B & O to attain by itself. 317 I.C.C. 275, 279, 290-91. It found that the C & O had the financial ability to aid B & O, as it was prepared to do, and that the affiliation would have no material adverse effect upon any other railroads. 317 I.C.C. 282, 290-91. Subject to conditions requiring the maintenance of existing routes and channels of trade and conditions to protect the interests of employees of the two railroads who otherwise might be prejudiced by the transaction, the Commission concluded that approval of the C & O's application would strengthen the B & O, enhance its ability economically and efficiently to meet the needs of the populous and industrially significant portion of the Nation which it serves and be beneficial to the public. 317 I.C.C. 291, 293.

Suit to set aside the Commission's order was brought

January 25, 1963, by the Brotherhood of Maintenance of Way Employes, one of the constituent organizations in the Railway Labor Executives' Association, which was permitted to intervene as a plaintiff a few days later. Three other constituent organizations, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, The International Association of Machinists and the Brotherhood of Railway Carmen of America, subsequently filed their separate complaint in intervention on April 25, 1963.

The Department of Justice answered the original complaint, neither admitting nor denying its allegations, except insofar as the Commission's report was alleged to have been unsupported by adequate findings upon substantial evidence of the effect of the proposed transaction upon other railroads and "upon the structure of the railroad industry in the Eastern United States."

The district court noted, however, that the Department's briefs and arguments made clear that in urging the remand of the case to the Commission for further proceedings, the Department intended "that such further proceedings include the consolidation of the C & O application with two railroad merger applications now before the Commission, and to withhold decision of the C & O matter until conclusion of the hearings on such other applications, to the end that a contemporaneous decision might be made of all the pending control and merger applications which involve the eastern railroads." J.S. No. 510, pp. 2a-3a; J.S. No. 511, pp. 26-27.

Since the entry of the district court's judgment, the

United States has reappraised its position on the Commission's order, and it now offers no opposition to it. In his prepared statement of October 1, 1963, in the PRR-Central merger application hearing, Assistant Attorney General William H. Orrick, Jr., declared, "The United States supported a labor union appeal of the I.C.C. order approving C & O's acquisition of control of B & O in the District Court, because of concern that the Commission had not adequately analyzed the impact of C&O-B&O affiliation upon other railroads. On the basis of its study [of pending merger proposals], the United States now believes that the acquisition of control is in the public interest, and, if the case were remanded to the Commission, the United States would not oppose approval of the transaction."[2] The withdrawal of the Department's opposition is reflective of the conclusion of the President's Interagency Committee on Transport Mergers, as expressed October 14, 1963, by its Chairman, Undersecretary of Commerce for Transportation Clarence D. Martin, Jr., who said in a prepared statement, "We believe the Chesapeake and Ohio-Baltimore and Ohio combination to be in the public interest, particularly in the light of a stipulation allowing the re-opening of the case should an undue diversion of traffic occur."[3]

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[2] Concurrently, the Department announced that it had entered into a stipulation with the C&O and B&O in substance providing that the application proceedings may be reopened for the imposition of further conditions in the event the control shall be found by the Commission to have resulted in undue diversion of traffic. See p. 12, infra

[3] Remarks before Board of Directors, Transportation Association of America, Ponte Vedra Beach, Florida.

The district court's decision reveals a thoroughgoing canvass of the voluminous record developed before the Commission and a careful review of the Commission's report and order, in the light of the applicable statutory standards. Without reiterating the district court's seriatim consideration of the several contentions advanced by the plaintiffs, it suffices here to observe that the district court determined that the Commission's findings sufficiently exposed its view of the evidence and the basis upon which it reached its ultimate conclusion that C & O's acquisition of control of B & O was warranted by the statutory criteria and the evidence adduced at the extended hearings. J.S. No. 510, pp. 12a-13a; J.S. No. 511, p. 36. Moreover, the district court stated that it was satisfied that the Commission committed no errors of law, that its actions were not arbitrary, capricious or in abuse of discretion and that its findings were supported by substantial evidence on the whole record. J.S. No. 510, pp. 19a-20a; J.S. No. 511, p. 42.

ARGUMENT

These appeals present no substantial question warranting plenary consideration by this Court. Whether it should authorize one carrier's acquisition of control of another as being consistent with the public interest is a matter of regulatory policy peculiarly within the province of the Commission. Since, as the district court determined, the order of the Commission came within its statutory authority and was based upon adequate findings supported by substantial evidence, there is no occasion for further hearing by this Court. *City of Nashville, Tennessee* v. *United States*, 155 F. Supp.

98, 103-104 (M.D. Tenn. 1957), aff'd mem. 355 U.S. 63 (1957); *M. & M. Transportation Company* v. *United States,* 128 F. Supp. 296, 298-99 (D. Mass. 1955), aff'd mem., 350 U.S. 857 (1955); *Baltimore Transfer Co.* v. *Interstate Commerce Commission,* 114 F. Supp. 558, 563-64 (D. Md. 1953); aff'd mem., 346 U.S. 890 (1953); *Herrin Transp. Co.* v. *United States,* 108 F. Supp. 89, 93 (E.D. La. 1952), aff'd mem., 344 U.S. 925 (1953); *Missouri Pac. R. Co.* v. *United States,* 4 F. Supp. 449, 452 (E.D. Ky. 1933), aff'd mem., 293 U.S. 524 (1934).

The appellants raise no question as to the sufficiency of the conditions imposed by the Commission for the protection of their members or other employees of C&O and B&O who may be adversely affected by the transaction.[4] *Cf. Maintenance of Way Employes* v. *United States,* 366 U.S. 169 (1961); *Railway Labor Association* v. *United States,* 399 U.S. 142 (1950). Nor do they assert that the considered transaction poses an irreconcilable conflict with the principles of the antitrust laws, *cf., Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173 (1959); *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), or that it lay beyond the scope of the Commission's jurisdiction to approve. *Cf., County of Marin* v. *United States,* 356 U.S. 412 (1958); *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151 (1957). As the district court incisively observed, J.S. No. 510, p. 7a; J.S. No. 511, pp. 30-31:

> The primary question before us is whether the findings of the Commission are supported by sub-

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[4] The alleged error of the Commission in not imposing conditions affording "protection to employees of any but the carriers directly

stantial evidence on the whole record. As discussed more fully below, we hold that they are.

1. The record evidence of the distress of the B & O was overwhelming, and it stood largely unrefuted. Operating personnel of both the B & O and C & O and an independent consulting engineer testified at great length on the financially-compelled deferred maintenance on the lines of the B & O and of the manifest needs for replacing rails, cross-ties and ballast merely to permit the safe operation of its trains. They testified also with respect to B & O's diminishing fleet of serviceable freight cars and of the need for enlarging tunnel clearances, installing effective signaling systems and otherwise modernizing the plant and facilities of the B & O to enable it efficiently and economically to meet the needs of the shipping public, in competition with other carriers.

They and other witnesses testified in detail of B & O's inability alone to finance the urgent and massive rehabilitation program and of the aid that C & O could and would extend to B & O as an affiliated company. The district court summarized this evidence and, at J.S. No. 510, p. 8a; J.S. No. 511, pp. 31-32, concluded:

> The Commission found, on the evidence, that "Strengthened as a result of control, B & O's ability to meet the needs of commerce and the national defense will be enhanced." We are im-

involved in the transaction", J.S. No. 510, p. 23, was neither presented to the Commission nor urged before the district court and, hence, cannot now be raised for the first time. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291 (1949).

pressed that there was substantial evidence in the record to support such findings and that such findings add weight to the Commission's ultimate conclusion that the C & O-B & O affiliation was consistent with the public interest.

Appellants offer no serious challenge to these basic considerations motivating the Commission's actions, though, in a play on words, they say, at J.S. No. 511, p. 20, "B & O's financial and physical condition [did not] *require* said Order approving control." [Emphasis added.] The Commission approval of the transaction, of course, was not dependent upon a finding by it that there were no other alternatives for coping with the B & O's ills but merely that the proposals advanced by C & O were "consistent with the public interest", the statutory standards, among others, considered. "It was unimportant that there were other sources. Even if there were, it was not improper that the [acquiring railroad] should furnish it. Indeed, in view of the considerations making for the unification it was the logical party to do so." *Missouri Pac. R. Co.* v. *United States, supra,* at 4 F. Supp. 459.

2. Abundant testimony related to the probable effect of C & O's acquisition of control of B & O upon the other railroads in the East. Much of it related to the Central, the Central having been the most outspoken opponent of the proposed transaction and the competing carrier assertedly most likely to suffer any loss of traffic if that were the result of the affiliation.

Traffic divertibility studies were introduced by Central and C & O and B & O, and the assumptions under-

lying their studies were subjected to penetrating cross-examination. While recognizing that these estimates of traffic diversion "were prepared on different bases" and "[i]n many respects were not comparable", 317 I.C.C. 282, the Commission, after discussing the premises upon which the Central study was based, concluded, that "[b]ecause the assumptions indulged in by Central are highly speculative, its divertibility study has little probative value." 317 I.C.C. 281.[5] The appellants contended that "the studies offered by Central had more probative value than those of the applicant." J.S. No. 510, p. 21. However, as this Court said in *Alton R. Co.* v. *United States*, 315 U.S. 15, 23 (1942), "The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts." Accord, *Chicago, St. P., M. & O. R. Co.* v. *United States*, 322 U.S. 1, 2-3 (1944); *United States* v. *Carolina Freight Carriers*, 315 U.S. 475, 484, 489-90 (1942).

Wholly uncontested was the testimony of the many responsible shipper witnesses who testified, both with respect to the Central and the other railroads in the East, that the acquisition by C & O of control of the B & O would occasion no change in their allocation[6]

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[5] Central assumed much more than merely a strengthened C&O-B&O system. J.S. No. 510, p. 21. It assumed as well a competitively impotent Central and a mammoth PRR-N&W-Nickel Plate combine confronting it.

[6] The right of shippers to route their traffic is found in Section 15(8) of the Interstate Commerce Act, 49 U.S.C. § 15(8).

of freight among the railroads serving them and that they could not foresee any diversion of traffic from competing lines as a result of the affiliation of the C & O and B & O. Also unrebutted was the testimony of C & O and B & O executives that the railroads would refrain from a deliberate policy of preferential routing or of otherwise raiding the traffic of other railroads in the East in favor of their affiliate.

Also, the Commission imposed conditions upon its approval of the proposed transaction designed to assure the maintenance of existing routes in which the B & O and C & O have participated with competing railroads. 317 I.C.C. 345. Similar conditions previously have been imposed by the Commission and held by the courts as efficacious in preventing diversion of large volumes of traffic following Commission approval of a merger or control application. *Canadian Pacific Railway Company* v. *United States*, 158 F. Supp. 248, 254 (D. Minn. 1958); *New York, C. & St. L. R. Co.* v. *United States*, 95 F. Supp. 811, 814 (N.D. Ohio 1951). Moreover, since the date of the district court's decision, the C & O and B & O, by stipulation with the United States filed with the Commission, have agreed that, if the Commission's order is sustained, "the Commission shall retain jurisdiction to impose further conditions and orders as may be necessary and appropriate and in the public interest in the event that the said control shall be found by the Commission to have resulted in undue diversion of traffic from any other railroad in the territory involved in such transaction".

"Such conditions are designed to maintain and keep

open all routes and channels of trade via existing junctions and gateways, protect traffic and operating relationships, to preserve the routing rights of shippers, and to keep open to all parties the right to return to this Commission for such modifications or supplementation of the conditions as developments may show to be required in the public interest." *Erie R. Co. Merger*, 312 I.C.C. 185, 191 (1960), sustained, *Maintenance Employees* v. *United States, supra.* That the Commission in its report did not attempt to forecast the precise tonnage that might be diverted, notwithstanding such conditions, or identify the carriers in the East who might suffer some loss of freight or to fix the exact point for each where a tolerable diversion of traffic resulting from the transaction might become "undue" does not render its findings deficient, as appellants allege. J.S. No. 510, p. 22; J.S. No. 511, pp. 17-18. In disposing of appellants' contentions, the district court excerpted from the Commission's report and at J.S. No. 510, pp. 9a, 12a; J.S. No. 32-33; 35, stated:

> The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction. In its findings, the Commission carefully reviewed the testimony given by Central's witnesses, gave its reasons why it found their estimates unreliable, and reviewed the evidence supportive of its conclusion that the claimed diversion of traffic from Central would not be undue.

* * * * *

> We hold that the Commission did give consideration to the effect of the affiliation on other railroads, that it made adequate findings on the subject and that such findings were supported by substantial evidence.

In view of such imponderables as the shippers' right to route traffic and the effectiveness of traffic solicitation efforts, we submit that the court below was clearly correct in refusing to hold the Commission to a delusive standard of precision in appraising possible diversion of traffic.

3. Appellants allege, at J.S. No. 511, p. 13, that the Commission "abandoned its statutory duty" in not ordering its staff to undertake "an independent investigation of the impact of these applications on the public interest."

The record having been developed exhaustively, both in support of the C & O's applications and in opposition thereto, no need was evident, however, for the Commission *sua sponte* to direct its staff to participate in the proceedings. Neither these applicants nor any other party, including the Department of Justice, suggested at any time during the long course of the hearings that the record was deficient, that they lacked the necessary resources and expertise and that they required the assistance of the Commission's staff to prepare and submit data indicating where the balance of the public interest in the considered transaction lay. To allege, as the appellants now do, that "[b]oth the Commission and the court below treated the absence of opposing evidence as tantamount to proof that the pro-

posed control transaction was consistent with the public interest", J.S. No. 510, p. 20, and that "[t]he applications herein were thus granted almost by default", J.S. No. 511, p. 14, certainly minimizes, if it doesn't impeach, the testimony of the 16 witnesses which the appellants presented, as it casually dismisses the testimony of the more than 300 other witnesses presented in opposition to the transaction. Of the Commission's authority, in addition, to hire independent counsel or experts, the district court, at J.S. No. 510, pp. 14a-15a, J.S. No. 511, pp. 37-38, said:

> A lack of confidence in the reliability and adequacy of the showing made before it may, indeed, prompt it to take such action. In this case, however, there were extended hearings with able adversaries exploring all facets of the issues involved; in addition to the Commission's own concern for it, the public interest was represented by the office of the Attorney General of the United States; the Commission found that the evidence supporting the application was of such quality, credibility and accuracy as to persuade it that the public interest would be served by approving such application. In this context, it can hardly be said that the Commission's discretion was abused in its failure to have undertaken, by counsel and experts employed by it, an adversary attack upon the case made before it.

The request made at the conclusion of the hearings that the proceedings be consolidated with those in the N & W-Nickel Plate and PRR-Central merger cases

was not made to fill an evidentiary void but to assure that "the most soundly conceived alignment of all the various railroads in the East will be accomplished". However, it no longer is for the Commission to accomplish the restructuring of the railroads in accordance with its concept of the optimum allocation of lines. As this Court well stated in *County of Marin* v. *United States*, 356 U.S. 412, 416-17 (1958):

> The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system. In the Transportation Act of 1920 the Congress had directed the Commission itself to take the initiative in developing a plan "for the consolidation of the railway properties of the continental United States into a limited number of systems," 41 Stat. 481, but after 20 years of trial the approach appeared inadequate. The Transportation Act of 1940 extended § 5 to motor and water carriers, and relieved the Commission of its responsibility to initiate the unifications. "Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation*, if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness . . ." (Emphasis added.) *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948).

Accord, *St. Joe Paper Co.* v. *Atl. Coast Line R. Co.*, 347 U.S. 298, 305, 310 (1954); *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948).

Moreover, the proposed transaction was not for the permanent integration of the B & O into the C & O. On the contrary, as the Commission found, its approval would not effect the existence of the two railroads as separate corporate entities, with separate sales and operating departments and with their separate corporate policies to pursue. Thus, if there was a need for an overall view of the effect upon the Eastern railroads of the merger of the C & O and the B & O, the N & W and the Nickel Plate and the PRR and the Central, it could not then be taken, for a proposal for the merger of the C & O and the B & O was not (and is not) yet before the Commission. The approval of the stock acquisition in no way committed the Commission to approve the eventual merger of the B & O and the C & O or, for that matter, that of the N & W-Nickel Plate or the PRR-Central. The merits of any application to merge the two roads will have to await consideration by the Commission, and whether the Commission at such time will undertake the joint hearing or consideration of such a merger application proceeding with the then pending merger cases remains to be seen. *Cf., Spokane International R. Co. Control*, 295 I.C.C. 425, 438 (1956), sustained, *Canadian Pacific Railway Co.* v. *United States*, 158 F. Supp. 248 (D. Minn. 1958); *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 489 (1950), sustained, *New York, C. & St. L. R. Co.* v. *United States*, 95 F. Supp. 811 (N.D. Ohio 1951).

It is well settled that whether an administrative agency, such as the Commission, orders the consolidation of proceedings is a matter left to its discretion. *Communications Comm'n* v. *WJR*, 337 U.S. 265, 283 (1949); *Federal Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Certainly, the Commission did not abuse that discretion here. As previously stated, at the time the petition seeking consolidation of the proceedings was filed, the applications of the C & O were before the Commission for its decision. The examiner's report in the N & W-Nickel Plate merger case had not yet been served and the hearings in the PRR-Central merger cases remained in progress. By any fair estimate, to have held up the decision on the C & O's applications until the two merger cases were ripe for decision by the Commission would have meant a delay of approximately two years (and perhaps a delay of several years pending a complex judicial review)—a delay which the record before the Commission established neither the B & O nor the public which it serves could afford.

The evidence before the Commission established that the B & O equipment and plant were in poor condition; that with little prospect of replacing cars and tracks out of current earnings, the cost of attempting to maintain them only sufficiently to meet the present needs of the railroad was a tremendous strain upon the B & O. The delay in the infusion of financial aid, such as the C & O was prepared to extend, which would have been occasioned by the grant of the petition to consoli-

date the proceedings with those in the N & W-Nickel Plate and PRR-Central merger cases would have been injurious to the B & O, and, ultimately, to the public. The record demonstrated a need on the part of the B & O for the prompt financial succor of the C & O. Denial of the petition accordingly was reasonable and proper; it certainly was not an abuse of the Commission's discretion.

The district court in the pungent penultimate paragraph of its opinion, at J.S. No. 510, p. 19a; J.S. No. 511, p. 42, said:

> The evidence in this case shows that the B & O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that appears to be available to it in the control proposal of the C & O. We cannot predict at this time how many months or years would be consumed in trying to find the perfect, or merely a better, solution of the problems of our eastern railroads, large and small. As stated by Justice Jackson, reviewing the failure of a nationwide plan, "waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements." *Schwabacher* v. *United States, supra*, 334 U.S. at p. 193. The Commission is satisfied that the approval of the application before it involving

> the C & O and B & O will be a definite step forward in solving this great national problem. We are not persuaded that the Commission is wrong. In all events, it is not our function to substitute our judgment for that of the Commission. *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 188. The Commission's wisdom and experience, not ours, must determine whether its approval of the C & O-B & O affiliation is consistent with the public interest. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87.

4. Appellant's generalized criticism of the Commission's handling of control and acquisition proceedings, J.S. No. 510, pp. 18-19; J.S. No. 511, pp. 10-12, is better addressed to the Congress, as, indeed, it was only last year. *Hearings on S. 3097 Before a Subcommittee of the Senate Committee on the Judiciary,* 87th Cong., 2d Sess. (1962); *Report of the Senate Subcommittee on Antitrust and Monopoly on The Railroad Merger Problem,* 88th Cong., 1st Sess. (1963). There, as here, the appellants professed concern that the proposal of the C & O to acquire control of the B & O, together with the proposals of the N & W-Nickel Plate and PRR-Central, would accomplish a far-reaching realignment of the railroads in the East without any design or plan; there as here the charge was made that these carriers had entered into a conspiracy of silence which prevented the Commission from getting all of the facts necessary for a meaningful determination of the issues; there as here it was

contended that the enormity and interrelation of the problems posed by these cases required the proceedings to be consolidated or, at least, simultaneously considered. The Congress, however, seems to have been unimpressed, for no legislative change was enacted. "[W]e think it fair to read this history as a *de facto* acquiescence in and ratification of the Commission's . . . procedure by Congress." *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 409 (1961).

5. The Commission requires no reminder of the grave responsibilities entrusted to it under section 5 of the Interstate Commerce Act and the National Transportation Policy. *Maintenance Employes* v. *United States, supra; Minneapolis & St. Louis R. Co.* v. *United States, supra.* Its report and order approving the C & O's acquisition of the B & O amply demonstrate that it approached its task with concern not only for the welfare of the employees affected, the communities served by the railroads and the shippers and receivers dependent upon their services and those of competing carriers but also for the adequacy of railroad service in the area, its economy and its efficiency. *United Staates* v. *Lowden,* 308 U.S. 225, 230 (1939); *N. Y. Central Securities Co.* v. *United States,* 287 U.S. 12, 25-26. It reveals that the Commission fully considered all of the factors to which, under the statute and this Court's decisions, it must give effect in determining whether a proposed transaction is consistent with the public interest; it reveals that the Commission neither exceeded the limits of its dele-

gated authority[7] nor fell short of discharging fully its task.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

ROBERT W. GINNANE,
General Counsel.

FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

October, 1963.

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[7] The Act has been held not to violate the due process clause, *United States* v. *Lowden, supra,* at 308 U.S. 239-40; *Canadian Pacific Ry. Co.* v. *United States,* 158 F. Supp. 248, 256 (D. Minn. 1958), or to exceed the limits of delegable authority. *N. Y. Central Securities Co.* v. *United States, supra,* at 287 U.S. 24-25.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 710783 381